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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR THE PETITIONER

I.

The Facts in This Record Clearly Establish That Petitioner Was Denied Due Process of Law Under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States by the Admission Into Evidence of State's Exhibit No. 13.

Respondent in its brief, details at pages 35-41 the testimony of petitioner concerning his treatment in the Midland County jail, beginning on Friday, July 13, following his arrest by Sgt. Morales at 6:00 A.M. Sunday morning, July 8. As we pointed out in our original brief (Br. 24-25), petitioner did not claim that he was mistreated after he

was delivered into the custody of the sheriff. In detailing this testimony, the apparent purpose of respondent is to show that petitioner was not mistreated from Friday afternoon until Tuesday morning, when he was brought to the sheriff's office about 9:30 A.M. and began his written statement about 10:45 A.M. At this time, petitioner had already signed the first two statements which were procured by coercion.

Respondent's position seems to be that the effect of the coercive and abusive treatment of petitioner while he was in the hands of the city police and the Texas Rangers, was completely expurgated by the passage of three full days' time. The testimony of petitioner, as well as human experience, effectively rebut this proposition.

In our original brief, we called attention to petitioner's testimony demonstrating his state of mind on Tuesday morning (Br. 26, 45, 55, 86). Petitioner further testified (R. 307):

> "I was scared: I was scared they would do the same thing."

And, (R. 127):

> "Q. All right: Now, Marvin, why did you sign that third statement?
>
> "A. Well, I was afraid. I didn't think I could go through with the same thing I had went through for three or four more days, and I had already signed two statements, so I didn't figure it made any difference.
>
> "Q. Did they say something to you about taking another lie detector test?
>
> "A. Yes, sir, the officer that testified in here before I did, he asked me to take one.

"Q. Did you want to take another lie detector test?

"A. No, sir. I told him I wouldn't take nary another one.

• • • • •

"Q. Did you believe or didn't you that the same things would happen to you if you didn't sign another statement?

"A. Yes, sir, I believed the same thing would happen.

"Q. All right. Now, did Mr. Fletcher or Mr. Howell or anybody abuse you during that hour that you talked to them?

"A. No, sir.

"Q. All right. Did you have any reason to know whether they would or not unless you did sign a statement?

"A. Well, no, sir, I didn't have any reason, but those other officers, they told me things and they backed out on what they told me, so I didn't have any more belief about them than I did the others. They done something to me that they said they wouldn't do."

Portions of petitioner's testimony excerpted in our original brief are even more descriptive, but to reproduce them again would be repetitious. When all of these facts, and all of the aspects of petitioner's treatment at the hands of the police are gathered together, it is obvious that this petitioner could not have successfully resisted the pressures which began working anew as soon as he was brought into the sheriff's office on Tuesday morning, July 17. Petitioner did deny his guilt in the beginning, and asked to talk to someone. The "someone" he was allowed to talk to was the district attorney. As petitioner testified, when they brought the district attorney down, he could see the same pattern

of events begin taking shape once again (R. 153). He was afraid, and he knew that further resistance would be useless: They would eventually break him down, just as the other officers had done on the two previous occasions. He might as well go ahead and get it over with. As he said (R. 153):

> "I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement, because I had already made two statements, and I didn't figure it made any difference. I had signed two."

Respondent, in its brief (Br. 36-41), quotes petitioner's testimony from pages 148-151 of the Record. Respondent does not carry that testimony forward, and five lines after his last quote, on page 152, this testimony appears:

> "Q. He didn't scare you in any way, did he?
>
> "A. Well, neither one of them, I would say, didn't scare me. *I was scared at the beginning.*" (Emphasis our own.)

This, in itself, demonstrates that the coercive influence of petitioner's early experience at the hands of the police still carried over and was still very dominant in his thinking on the morning the third confession was taken.

To accept respondent's view—that the influences which produced the first two confessions were no longer operating when the third confession was made, and that the "taint" had been dissipated—would be to invite new subterfuge on the part of law enforcement officers. Instructions in police manuals might well read: "Hit him, slap him, starve him, keep him up late at night, lock him up in a little room with

nothing but a chair and an ash tray, interrogate him relentlessly, take him to the grave, subject him to polygraph tests, transport him hundreds of miles in an automobile with officers, do not take him before a magistrate, do not explain his rights to him or procure counsel for him, until you have gotten a confession. Then, if the first confession doesn't suit you, do these things all over again until you get another confession from him. When you've gotten the confession you want, then turn him over to some other law enforcement agency in another jail, where he is fed, permitted to sleep, has visitors, and wait three days. Then let them bring him down, explain his rights to him in the most general terms possible, and start all over again. That makes it all right, because the coercion you had practiced on the suspect has been attenuated in law. The courts have said that a man cannot stay frightened after three days, even though he is kept in continuous custody and denies his guilt."

Mr. Justice Murphy, dissenting from the majority opinion in *Lyons* vs. *Oklahoma,* 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944):

> "Presumably, therefore, this decision means that state officers are free to force a confession from an individual by ruthless methods, knowing full well that they dare not use such a confession at the trial, and then, as a part of the same continuous transaction and before the effects of the coercion can fairly be said to have completely worn off, procure another confession without any immediate violence being inflicted."

Respondent's position here simply does not comport with human experience. Fear is not necessarily a fear of par-

ticular individuals. Marvin Clewis's fear was a fear of the awesome power of, and the brutality of, law enforcement officers, as evidenced by his treatment at the hands of officers who totally disregarded his rights and made a mockery of his dignity as an individual. "I didn't think I could take that no more" (R. 153).

As Chief Judge Tuttle observed in *Collins* vs. *Beto*, 348 F.2d 823, (5th Cir., 1965):

> "Nor can the mere passage of time serve to 'dissipate the taint' of an unlawful arrest. If this were so, the police would be free simply to keep a suspect 'on ice' for a day or two before beginning interrogation. This would postpone the tasting of the fruit but would not diminish its temptation."

Petitioner was not warned by Mr. Howell (the officer who reduced the third confession to writing, ten days after he was first arrested), prior to orally confessing. Deputy Howell's testimony reveals that the oral confession came first (R. 232-233):

> "Q. And did you and Mr. Fletcher talk to this defendant before you took that statement?
>
> "A. We did.
>
> "Q. Did he at first deny any guilt in connection with the death of his wife?
>
> • • • • •
>
> "A. He did.
>
> "Q. With which he had been by that time charged, had he not?
>
> "A. I believe so, yes, sir.
>
> "Q. Now did you talk to him for sometime after that?

"A. I did.

"Q. Did he still deny it?

"A. For a brief time, yes, sir.

"Q. Did he deny it until the time just prior to the time you began taking the statement?

"A. No, sir.

"Q. How long then would you say that denial continued?

"A. I would say it probably continued for a period of time. It wasn't said over a time or two, but it was during a period of some probably thirty or thirty-five minutes.

"Q. All right, I believe you said you first brought him down and started talking to him at 9:30 and started taking the statement around 10:30 or 10:45.

"A. Those are time approximately correct, yes, sir."

It is clear from Deputy Howell's testimony that the only warning given to petitioner was just prior to the time that the written statement was taken (R. 230):

"Q. I ask you further, sir, if before Mr. Clewis gave you State's Exhibit 13 whether or not you first warned him that he did not have to make any statement at all.

"A. I did.

"Q. And that any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement is made?

"A. I did to that exact effect, yes, sir."

Failure to warn before the oral admission on Tuesday should bar the confession introduced in evidence. *Killough* vs. *United States,* 114 U.S. App. D.C. 305, 315 F.2d 241

(U.S. App. D.C., 1962); *Collins* vs. *Beto*, 348 F.2d 823 (5th Cir., 1965). The reaffirmation in writing of petitioner's oral statement cannot be considered independent of that statement. *Collins* vs. *Beto, supra.* Further, we submit that a warning by a law enforcement officer is not sufficient.

The same influences which caused Marvin Clewis to confess on the first two occasions were still operating on Tuesday morning when he was brought to the sheriff's office and the confession which was introduced in evidence was taken from him. The taint had not been dissipated—neither the taint of the coercive and abusive treatment which rendered his first two confessions involuntary, nor the taint of his unlawful arrest without a warrant by officer Morales. Everything that transpired was, in fact, the "fruit" of that first arrest. Petitioner's detention was at all times unlawful: he was still being detained as the result of a warrant which was issued on the ground of his first coerced confession, which in turn resulted from his illegal arrest by Morales.

Respondent cites *Goldsmith* vs. *United States,* 277 F.2d 335 (D.C. App., 1960) in support of its position here. That case, concerned primarily with interpretation of *Rule 5 (a), Federal Rules of Criminal Procedure,* was decided on the basis of the federal rules concerning arraignment, as set forth in *Mallory* vs. *United States,* 354 U.S. 449, 77 S.Ct. 1356. Counsel was appointed for the defendants and came and advised them of their rights. The judge also gave them a clear warning at the arraignment, but the statements were reaffirmed within an hour thereafter and the appellants also re-enacted the crime.

The Court said:

> "Appellants not only reaffirmed their formal written statements while they were lawfully detained, but did so in utterances which were plainly spontaneous and at a time when both the judicial warning and the advice of counsel as to their right to remain silent were not more than an hour old."

It can hardly be said that any statements made by Marvin Clewis were "spontaneous." They were in fact produced by coercion and relentless interrogation. The purpose of all interrogations conducted by the police and the deputy sheriffs was to secure a written confession. In his concurring opinion in *Killough* vs. *United States,* 315 F.2d 241 (U.S. App. D.C., 1962), Judge Wright analyzes the problem most succinctly. The following are excerpts from that opinion:

> "Admittedly, it is difficult to determine whether there is a connection between two confessions. But, human nature being what it is, we must recognize a presumption that one is the fruit of the other . . . There is then a rebuttable presumption that all subsequent confessions are tainted by the continuing influence of coercion."

And, at 315 F.2d 250:

> "The question remains whether the presumption of continuing coercion can survive the magistrate's hearing at which the accused is authoritatively advised, in the presence of his tormentors, that he may remain silent. I think it does. So saying, I do not belittle the commissioners' role or the importance of the statement required by *Rule 5 (b). But it must be remembered that*

the Rule contemplates a whole man, freshly arrested. For him, timely counsel as to his constitutional rights is a strong shield against police efforts to obtain a confession. The 'broken' man who has already yielded to coercion, is not so easily revived." (Emphasis our own.)

"So long as it can be said to be causally related to an admission secured during illegal detention, the subsequent confession is itself the 'fruit of the wrongdoing' and must be excluded."

And, again, at page 251:

"Certainly, lapse of time is an important factor . . . *But even a long interval between two confessions will not show them to be unconnected* unless the suspect was, in the meantime, enlarged, or at least left alone to regain his strength."

Judge Wright also points out how easy it would be for the police, on the second interrogation, to convince the suspect that his prior confession is, in fact, binding on him. That was the case here, when Marvin Clewis "figured it didn't make any difference." He had already signed two confessions beforehand.

The majority in *Killough* vs. *United States, supra,* deciding the case primarily on federal procedural grounds, said:

"To turn the law into a means of obtaining convictions by violating constitutional and statutory safeguards would in the end cause greater loss than gain, and would encourage deterioration in methods of detection."

And, Judge Wright said this:

> "The judiciary should not encourage illegal police practices by rewarding guilty officers with a successful prosecution."

This, petitioner submits, is a correct statement of the protection granted to our citizens under the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

In *Castle* vs. *United States,* 287 F.2d 657 (5th Cir., 1961), and *United States* vs. *Hickey,* 247 F.Supp. 621 (D.C. Penna., 1965), both relied upon by respondent in this case, there was no evidence of any kind indicating intimidation, coercion, duress, threats, or promises. In *Castle,* the appellant telephoned counsel at the beginning of the interrogation and a lawyer came and gave him advice. In *Hickey,* the statement in question was given within an hour after the defendant had been carefully warned of his constitutional rights.

United States vs. *Bayer,* 331 U.S. 532, 67 S.Ct. 1394 (19), also cited by respondent, is easily distinguished. In that case, a period of six months had elapsed between the two confessions in question.

The ultimate inquiry must be, of course, whether or not the confession was voluntary. That determination must always be made from the facts in each particular case. Petitioner submits that, contrary to respondent's assertion, admission of State's Exhibit No. 13 into evidence did "violate the fundamental principles of justice." If the taint was there, the confession should not have been admitted. We disagree with respondent's premise that the subsequent confession must be "completely under the influence of the

first confession." In this case, we submit that it was—but if that influence is present *at all,* the subsequent confession cannot be "the product of a rational intellect and a free will."

Had petitioner been released and been freed from the restraint of custody and its attendant coercive atmosphere, and then voluntarily returned and made another confession, then it might well be that the taint of the unlawful arrest and of the coercive treatment at the hands of the police would have been attenuated. Such was not the case, and petitioner was never freed from the coercive circumstances which compelled him to speak when his will was overborne.

Petitioner was held in continuous custody from the time of his illegal arrest without a warrant until the third confession was signed. Without the illegal arrest, there would not have been a first confession, a second confession, or a third confession. It was the exploitation of that arrest which resulted in the third confession as well as the first two. As Mr. Justice Brennan, writing for the Court in *Yong Sun* vs. *United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), said:

> "The more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be *purged* of the primary taint' Maguire, *Evidence of Guilt,* 221 (1959)." (Emphasis our own.)

When that test is applied to the facts of this case, it is quite clear that the primary taint of the illegal arrest had not been "purged."

In the second *Killough* case, *Killough* vs. *United States*, 336 F.2d 929 (D.C. App., 1964), Judge Wright has attempted to draw guidelines for determining when a subsequent statement is "fruit of the poisonous tree":

> "It seems to me that this court should clearly state that where a confession is illegally obtained in violation of *Rule 5 (a), F.R.Cr.P.*, subsequent confessions, however or by whom abstracted, are likewise inadmissible unless the government convincingly demonstrates the absence of connection with the prior illegal confession. In presenting this proof, the following considerations, among others, are most important: (1) Did the defendant have the advice of counsel subsequent to the illegally obtained confession? (2) What was the time interval between the confessions? (3) Was the defendant admitted to bail during that interval? While, as indicated, these considerations are not exclusive, they certainly provide the primary avenues of inquiry in determining whether the subsequent confession resulted from the illegally obtained one."

Those guidelines are based, of course, upon decisions of this Court. Judge Wright was concerned with a *per se* violation of *Rule 5 (a)*, when the person arrested made a statement before being taken before a magistrate.

In this case, there is no evidence that petitioner's rights were ever explained to him by the justice of the peace, and there is evidence that his illegal detention in the hands of the police continued thereafter. Even after the time petitioner was taken before a magistrate, the only possible legal basis for his detention was a warrant which issued after that hearing where a complaint was filed charging petitioner

with shooting Dorothy Mae Clewis with a gun, which was the substance of his first confession. That confession was coerced, the warrant which finally issued was false, and petitioner was still being illegally detained on Tuesday, July 17, when State's Exhibit No. 13 was signed by him. He did not have the advice of counsel subsequent to the illegally obtained confession; the time interval was only three full days, and he was never admitted to bail. In addition to petitioner's own testimony revealing his fear and the continuing effects of his coercive treatment, these facts alone should exclude any confession made by petitioner as fruit of his illegal arrest as well as fruit of the poisonous tree of coercive treatment at the hands of the police.

II.

Failure to Take Petitioner Before a Magistrate as Required by Texas Law Following His Arrest Without a Warrant, Was a Denial of Due Process and Did in Fact Contribute to His Conviction.

Respondent contends that the failure of the officers to take petitioner before a magistrate for a period of 38 hours did not in any way result in prejudice to him at his trial (Br. 50). Admitting that the behavior of the officers was a violation of state law, respondent evidently would pass this off as "harmless error." We have detailed in our brief at pages 68-71 the considerable harm that resulted to petitioner by the long delay in taking him before a magistrate. We have included this point as one of the circumstances which rendered petitioner's confessions involuntary and therefore inadmissible.

Although this Court has not extended the *McNabb-Mallory* rule to state criminal trials, failure to take an accused before a magistrate has often been considered as a part of the "totality of the circumstances." *Fikes* vs. *Alabama,* 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957); *Reck* vs. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Turner* vs. *Pennsylvania,* 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949); *Haynes* vs. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). Respondent, in its brief, raises the direct question whether or not that rule is applicable to the states, and asserts that the exclusionary principle should not be extended to the states.

Petitioner does not agree. We submit that such extension is not only not inappropriate, but is in fact a desirable corollary to the rules set forth by this Court in *Miranda* vs. *Arizona,* 384 U.S. ——, 86 S.Ct. 1602, 16 L.Ed.2d —— (1966). Apart from the safeguards prescribed in *Miranda,* the only "other fully effective means" of advising a defendant of his right to keep silent, of his right to an attorney, for an attorney to be appointed, and for him to be apprised of the consequences flowing from his answers to interrogation, is to take him immediately before the magistrate. Additionally, as now provided by *Rule 5 (c), F.R.Cr.P.,* the magistrate should be required to inquire into the charge and be certain that the defendant is being held on probable cause. As pointed out in our original brief, *Article 245, Vernon's Annotated Texas Code of Criminal Procedure* (1925) places the duty upon the magistrate to "proceed to examine into the truth of the accusation made."

It is evident from this record that petitioner would never have been tried or convicted, had he been taken before a magistrate immediately after his arrest, as Texas law re-

quires, and as is required by *Rule 5 (a), F.R.Cr.P.* The *McNabb-Mallory* rule has worked well in the federal courts. It should be made applicable to all state prosecutions.

III.

Failure of the Trial Court to Grant Petitioner's Motion to Require the State to Produce All Confessions of Petitioner Was a Denial of Due Process.

Respondent says that we have cited no authority in support of this point in our original brief, and urges the Court to find that petitioner waived any such right by the remark of his attorney (Br. 50-51).

Mr. Justice Fortas clearly stated the current trend toward disclosure in criminal cases analogous to the civil practice, in *Dennis* vs. *United States,* —— U.S. ——, 86 S.Ct. 1849, —— L.Ed.2d —— (1966). That opinion is referred to at page 89 of our brief. Contrary to respondent's view, petitioner insists that this language does support our premise that the Constitution requires that petitioner's motion for discovery be granted.

New *Rule 16 (a)* of the *Federal Rules of Criminal Procedure* definitely requires that a defendant be permitted to see and examine his own statements in possession of the prosecution. This right of discovery should be extended to state trials.

In our original brief, we did not call attention to the line of decisions in California under which the rule has evolved requiring the prosecution to make disclosure of any statements made by a defendant. In *People* vs. *Riser,* 47 Cal.2d 566, 305 P.2d 1, 13, 14 (1956), the history of discovery was

traced, and it was pointed out that at common law the accused in a criminal case "could not compel production of documents or other evidence in possession of the prosecution. Production was denied before trial on the ground that to compel prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self-incrimination, would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor."

The California court went on to say:

"The question, then, is not whether the defendant will be allowed advance disclosure of evidence upon which the prosecution plans to base its case, but whether he will be allowed any disclosure of evidence that the prosecution does not intend to produce in court at all.

"Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case . . . To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.

"There must be more than a mere possibility that the statements when produced will contain contradictory matter and be in such form that they can be used to

impeach, but the chance that it may turn out eventually that they cannot be used for the purpose should not block production at the threshold. The precise problem, the relation between the admissibility and the right to production, was presented in *Gordon* vs. *United States, supra,* and the court there concluded that . . . 'production may sometimes be required though inspection may show that the document could properly be excluded.' "

In *Powell* vs. *Superior Court,* 48 Cal.2d 704, 312 P.2d 698, 700 (1957), the California court extended the rule announced in the *Riser* case by establishing the right of an accused to a pretrial production of the accused's own confession, admission, or statement:

"It nevertheless is a widely-recognized rule that application for pretrial inspection of a signed confession or admission of transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such inspection in the interest of justice."

In *People* vs. *Estrada,* 54 Cal.2d 713, 7 Cal. Reporter 897, 355 P.2d 641, 642 (1960), this language appears:

"The value of obtaining such a statement is that it may contain contradictions of the testimony of the witness, may omit some facts related by him at the trial, or may reveal a contrasting emphasis placed on the same facts. A defendant is not ordinarily in a position to show such matters until he has seen the statement."

While this case was concerned with the testimony of another witness, the same principle certainly applies to the defendant's own statements.

The next California case was that of *People* vs. *Garner*, 15 Cal. Reporter 623, 64 P.2d 452, 454 (1961), where the Court said:

> "Defendant's trial counsel was entitled to inspect, view, hear, or copy any and all statements of defendant's, and such was the order of the trial judge in discovery proceedings had before the trial."

In *People* vs. *Cooper*, 53 Cal.2d 755, 3 Cal. Reporter 148, 394 P.2d 964, 973 (1960), the California Supreme Court laid down the requirement that a defendant must show good cause for inspection, and that he must show more than a "mere desire for the benefit of all information which has been obtained by the people in the investigation of the crime."

These cases demonstrate the value of discovery, and the facts in the case before the Court readily demonstrate that prejudice.

Petitioner filed his Motion to Require State to Produce Confessions (R. 3-5) before any testimony was taken in this case, and it was overruled by the trial judge (R. 5). In that motion, petitioner showed good cause for inspection of the confessions, and asserted that such inspection was necessary if petitioner's defense was to be properly presented. Fairness required that the state produce these confessions and make them available to defendant. As summarized by Professor Murphy in his article "Criminal Discovery: What Progress Since U. S. vs. Aaron Burr?", *2 Criminal Law Bulletin No. 5*, page 14 (June, 1966):

"In the trial of a criminal case may we not start with the premise that truth is best revealed if ample authority is given to prepare in advance of trial? Is not criminal procedure designed to promote practices which will promote the quest for truth? And is the quest for truth best promoted by unequal adversaries under our adversary system? Or will the 'truth' be the 'truth' that *power* can impose? Power is on the side of the prosecution in a criminal case. Is it consonant with our constitutionally guaranteed concept of a fair trial to deny ample opportunity to the defense to prepare for trial? And does not that opportunity to prepare require a disclosure to the defendant of the evidence acquired by the imposition of unequal *power*?"

Respondent quotes a statement of counsel—made during the argument of another motion (petitioner's Motion to Exclude and Suppress Confessions) (R. 87-92)—and contends that this remark amounted to a waiver of any right to see or use the prior confessions. The trial court had already denied petitioner's Motion to Require State to Produce Confessions, and had stated to counsel that he would not require the state to produce them. The statement to which respondent refers was made after that action by the trial judge, and after evidence had been introduced in the main case.

Petitioner having already been denied the right to see, inspect, or use the statements, his counsel was at that point insisting that the prosecutor should produce the statements for examination by the court in connection with petitioner's Motion to Exclude and Suppress Confessions. That also was not done, although Mr. Justice Fortas in

Dennis vs. *United States,* —— U.S. ——, 86 S.Ct. 1840, —— L.Ed.2d —— (1966), effectively disposed of the contention that *in camera* inspection by the trial judge of grand jury minutes is a sufficient or satisfactory alternative. His opinion for the Court said:

> "While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

This is equally true of statements signed by a defendant.

Petitioner's counsel, having been denied the right to inspect the statements himself, was at this point alternatively urging that the trial judge should examine the statements in connection with petitioner's subsequent motion to exclude and suppress these confessions from the jury. In these circumstances, petitioner submits that there could have been no waiver of this right, and that denial of his Motion to Require State to Produce Confessions constituted a denial of due process.

While the decisions of this Court have been principally concerned with the interpretation of statutory procedural provisions governing the production of documents, rather than by the application of constitutional guarantees, past

decisions have also applied the common law. *Funk* vs. *United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369; *Gordon* vs. *United States*, 344 U.S. 414, 73 S.Ct. 369 (1953). In the latter case, the Court said:

> "In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the documents."

The basic principle of the *Jencks* decision is to assure the defendant a fair opportunity of making his defense. *Palermo* vs. *United States*, 360 U.S. 362, 365, 79 S.Ct. 1217, 1231 (concurring opinion of Mr. Justice Brennan). In the opinion just cited, Mr. Justice Brennan also notes the "serious question of potential invasion of Sixth Amendment Rights." Implicitly involved in the area of right to discovery is the right of any citizen to a fair trial. The Sixth Amendment also guarantees the accused the right of compulsory process to obtain witnesses for his defense, and Professor Wigmore has said that this right extends to the production of documents.[1]

Denial of access to petitioner's own statements in this case contravened the guaranties of due process and of compulsory process as extended to him by the Constitution. This, under no circumstances, can be considered "harmless error."

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[1] *8 Wigmore, Evidence*, Secs. 2191-93 (3rd ed. 1940). See also *United States* vs. *Burr*, 25 Fed. Cas. 30 (No. 14692d), CCVa. 1807).

CONCLUSION

Each confession secured from Marvin Clewis was obtained by means of coercion which rendered all such confessions involuntary. When the voluntariness rule and the totality of the circumstances criteria are applied to the facts of this case, the conclusion is inescapable that petitioner's will was overborne at the time he made the confession introduced in evidence at his trial. The same influences which "broke" him at first were still operating.

Petitioner's detention was, at all times, illegal. The confession introduced in evidence was the "fruit" of his illegal detention and of his unlawful arrest without a warrant. The confession introduced in evidence was "tainted" and, therefore, its admission when offered by the state was a deprivation of petitioner's constitutional rights.

Failure to take petitioner immediately before a magistrate, and the delay in taking him before a magistrate for a period of 38 hours, and then only after he had signed the first confession, was an important and significant coercive circumstance in determining the voluntariness of any confession made by him while in custody. The evidence shows that petitioner's rights were never fully or adequately explained to him, and that any explanation which might have been made by the magistrate when Clewis was finally taken before him, would have come much too late to be effective. Petitioner was already a "broken man." The *McNabb-Mallory* exclusionary rule should be extended to state trials.

Failure of the trial court to permit petitioner to examine and to use all statements extracted by the police from peti-

tioner, was a denial of due process. The right to disclosure now available in federal trials should be extended to state trials.

This conviction should be in all things reversed, and the use of any confession made prior to the trial and while petitioner was in continuous police custody, should be forbidden because such confessions were involuntary as a matter of law.

Respectfully submitted,

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